Supreme Court, U.S.
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No. 86-449

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CITY OF WILDWOOD,

Petitioner,

vs.

ANTOINETTE CONNIE ANELA, ANGELA DiPIETRO, MAUREEN McDONNELL, LISA TORTIS, GINA BUCCERI and ROXANN COX COLE

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is a municipal policy established by a city's routine adherence to a bail schedule imposed by a municipal judge which is directly contrary to a statewide rule of procedure promulgated by the state supreme court?

2. Does failure to provide pretrial detainees with a place to sleep or food and water, constitute unconstitutional punishment?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit review of whose judgment is sought by petitioner, is reported at 790 F.2d 1063 and is reprinted in Appendix A to the Petition at 1a-18a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE

These are three consolidated actions brought under 42 U.S.C. §1983 in which the various plaintiffs asserted violations of rights protected by the United States Constitution.

Although there are a number of misleading statements pertaining to the evidence set forth in the Petition for Certiorari, most of them will not be addressed as they do not go to the issues now before the Court. Suffice it to say that it is undisputed that plaintiffs were arrested at approximately 11:15 p.m. on the night of July 3, 1981 along with four other persons and taken to the Wildwood Police Station. The nine female arrestees, after booking procedures were completed, were kept in cells until approximately

11:00 a.m. the following morning except for one who was released in her mother's company at approximately 4:00 or 5:00 a.m. What should be noted, and is not mentioned by the petitioner, is that one of the arrested girls who is not a plaintiff here, did attempt to post bail by use of traveler's checks. She was told that she could not post bail. (Ja 157).

Testimony from the plaintiffs was consistent that no food or water was provided and that there were no sleeping facilities. At no time in this case did the City of Wildwood ever challenge those facts or give any indication in the Pretrial Order that there was any intent to present testimony or evidence about conditions in the cells.

While the City of Wildwood

makes it appear as though the nine arrested girls were kept together in cells as opposed to being sent elsewhere this is belied by their own answers to interrogatories (Ja 375) where it is indicated that there were only three cells existing for the holding of female prisoners. The nine girls were divided among these three cells evenly and certainly not as a result of any effort on the part of the Wildwood police to be accommodating.

There is no real dispute that it was regular practice in Wildwood to incarcerate persons arrested for minor offenses such as this one, unless they could meet the bail schedule set by the municipal judge. The City of Wildwood in effect conceded this in the Pretrial Order in its statement of contested fact

by indicating that the practice was that of the municipal judge and was not attributable to the City. (Ja 117). The issue of whether or not following the bail schedule set by the municipal judge could be a policy attributable to the City of Wildwood was addressed by the Third Circuit and was held to be regular practice and procedure and therefore a "policy" within the meaning of this Court's decision in Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Another issue raised in the Complaint was that the initial arrest was itself without probable cause. The trial court granted a motion for summary judgment and dismissed the cause of action based upon the guilty pleas

entered in municipal court. The Third Circuit reversed that holding and found that under New Jersey law a municipal court guilty plea could not be the basis for a finding of collateral estoppel in a later civil proceeding.

SUMMARY OF THE ARGUMENT

The Third Circuit correctly held that just as with individual citizens, a municipality and its public officials must be expected to know the law. Thus where there is a state supreme court rule requiring that persons arrested without a warrant for minor offenses be released after identification procedures are completed and a summons issued, and the city requires the posting of bail pursuant to directive of the local municipal judge, the city must bear responsibility for that regular procedure. Obeying a local judge's directive clearly contrary to an unequivocal rule of the state supreme court is a municipal policy from which liability under Section 1983 can flow.

There is no issue as to

municipal officals being constitutional scholars despite the argument set forth in the Petition for Certiorari. The Third Circuit held only that the City officials must obey the state court rule regarding release after issuance of a summons which was unequivocal and not subject to any particular court interpretation. In any event, plaintiffs here never advanced Rule 3:4-1 for any purpose other than deciding whether the practice of requiring bail was attributable to the City. The Third Circuit did not hold that violation of a state court rule is itself a constitutional violation. Accordingly, pages 14-17 of the Petition for Certiorari address a non-issue.

Finally, the conditions of the confinement of the plaintiffs in the

cells was clearly punishment and therefore unconstitutional. It is uncontested that there was no place to sleep, no food and no water during the 12 hour detention. There simply are no grounds to support such conditions as being necessary under the standards set in Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d. 447 (1979).

ARGUMENT

POINT ONE

TOLERANCE OF A REGULAR PRACTICE AMOUNTS TO MUNICIPAL POLICY SUFFICIENT TO IMPOSE LIABILITY UNDER SECTION 1983.

The lead case regarding imposition of liability on municipalities under 42 U.S.C. §1983 is Monell, supra. It was stated there that municipal liability may flow from either policy or custom, and this may occur even in the absence of formal conduct. Thus, official policy may be inferred from informal acts or omissions. Where there has been no formal approval, the custom and usages of local officials may be sufficient. 436 U.S. at 690-691, 98 S.Ct. at 2035-2036. Analysis of this issue is not altered by this Court's recent decision in Pembaur v. City of Cincinnati, __ U.S. __, 106 S.Ct. 1292

(1986). That case concerned a situation where force was used to gain entrance in order to serve a capias. The record indicated that there was no practice of using force, and it had been done in this instance based on a directive from the county prosecutor. The only issue was whether that directive could be construed as policy in light of the authority granted to the county prosecutor under Ohio law. Pembaur did not address the question of whether policy may be inferred from the normal custom and practice as was specifically approved in Monell. The issue the court decided was whether an unconstitutional act could be established by a single decision of the proper policy maker. 106 S.Ct. at 1300, n.11. Since this Court in Monell approved looking to

custom before it went on to bar liability on a respondeat superior theory, the arguments advanced in the Petition for Certiorari that respondeat superior was employed by the Third Circuit in this case, are unavailing.

Nor is there any weight to the arguments raised by the City of Wildwood regarding the alleged upholding by the Third Circuit that failure to follow a state rule amounts to a constitutional violation. The District Court's ruling challenged on appeal was simply that Wildwood could not be responsible for obeying the municipal judge. The Third Circuit in reversing found that the standards for existence of a policy under Monell were met by showing that the City routinely ignored Rule 3:4-1. That holding is precisely in accord with

the prior rulings of this court in Monell and later cases such as Pembaur. Wildwood is simply trying to create an issue out of whole cloth where it does not exist. The Third Circuit did not address the question of whether the detention was unconstitutional because the District Court did not reach that issue but rather ended its analysis with the finding that there was no policy attributable to the City. Wildwood is blatently trying to induce this Court to grant certiorari by asserting that the opinion is contrary to the established law set by this Court when in fact the issue Wildwood addresses is not before this Court.

The same holds true for the City's argument that the Third Circuit opinion would require local officials to

become constitutional scholars. First, as the City acknowledges, immunity considerations do not apply to municipal liability as opposed to that of individual public employees. In any event, the Third Circuit dealt with a rule of the New Jersey Supreme Court and not with decisions interpreting standards for constitutional violations. There is nothing at all in the decision below which would unduly burden local officials. Rule 3:4-1, as a pronouncement of the New Jersey Supreme Court must be obeyed. Clearly its violation alone does not expose local officials or the municipality to damages under Section 1983 except insofar as to provide the link between any constitutional violation that may occur and municipal responsibility for such

violation. Because this question goes only to the municipality's liability and not to that of individuals, there is no problem of public officers being impeded in their duty by fear of personal liability. That problem is covered by case law regarding grants of immunity which are not relevant here.

The final element of the City's attempt to find fault with the Third Circuit on this issue is the alleged lack of an affirmative link between the injury and the policy. This is arrant nonsense. The basis of this argument is that the policy of overnight detention had nothing to do with the plaintiffs' arrest. The simple answer is that the constitutional violation to which this policy pertains is not the arrest without probable cause, which in

this case now lies only against the arresting officers. Rather the policy was considered in terms of the alleged Fourteenth Amendment violation of excessive detention after the administrative steps incident to the arrest were completed. Again the City of Wildwood is attempting to mislead this Court by making arguments having nothing to do with the issue presented to this Court. There would be nothing inconsistent with the finding on the one hand that the arrests were proper but that the respondents' rights were violated by being incarcerated overnight after booking was completed. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1974); Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336 (7th Cir. 1985); Fisher v. Washington Metro

Area Transit Authority, 690 F.2d 1133 (4th Cir. 1982).

POINT TWO

FAILURE TO PROVIDE PRETRIAL DETAINEES WITH A PLACE TO SLEEP, FOOD OR WATER AMOUNTS TO PUNISHMENT IN VIOLATION OF THE FOURTEENTH AMENDMENT.

This Court expressly held in Bell v. Wolfish, supra, that conditions of confinement for pretrial detainees must not serve as punishment and must be related to a legitimate governmental objective. 441 U.S. 538. The conditions here which are not contested do not meet that standard and the Third Circuit correctly found that they failed the Bell v. Wolfish test.

All of the arrested respondents were placed in cells, three to a cell. Each testified without dispute that there were no sleeping facilities, the cells containing only a small bench, a sink and a toilet.

The circuit courts have found

that failure to provide bedding is a violation under Bell v. Wolfish. Thus, in Goodson v. City of Atlanta, 763 F.2d 1381 (11th Cir. 1985) a due process violation was found where Mr. Goodson was not given any bedding such as sheets and blankets in the first cell he was placed in, and then later was put in another cell with only a hard bench. In the first cell he was given roach infested food and during his eight hours in the second cell no food or water at all.

The Second Circuit dealt with a similar situation in LaReau v. Manson, 651 F.2d 96 (2d Cir. 1981). While the main issue in that case was "double bunking" where two inmates sleep in the same cell in a double bed, the court also addressed the question of having

detainees sleep on mattresses on the floor, which is more than was provided the respondents here. That practice was found to be "too egregious to warrant any such leeway. They constitute punishment without any regard to the number of days for which a prisoner is so confined." Id. at 105.

Within the Third Circuit the issue of sleeping on the floor has been addressed and again found to constitute punishment. In Union County Jail Inmates v. Di Bono, 713 F.2d 984 (3d Cir. 1983) the court addressed a situation where double bunking was offered as a cure to having people sleep on the floor. It stated that use of double bunking:

> will avoid the unsanitary and humiliating practice of forcing detainees to sleep on mattresses placed either on

> the floor adjacent to the toilet and at the feet of their cell-mates, or elsewhere in the Jail.
>
> 713 F.2d at 996.

Later in Monmouth County Correctional Institution Inmates v. Lanzaro, 595 F.Supp. 1417 (D.N.J. 1984) a former attorney general of New Jersey was appointed as a special master to review the conditions at that institution. Reviewing the special master's report, the court stated:

> He concluded that "sleeping on a concrete floor without a mattress is 'pain' and 'punishment' and that no circumstance short of an extreme, unavoidable and limited emergency could even justify inmates to sleep with only a sheet on the floor for any period of time without a mattress." SMR at 59-60. The master also concluded that "compelling pretrial detainees to sleep on mattresses placed on the floor for any period of time except in periods of emergency, constitutes

> punishment." In violation of the due process clause of the Fourteenth Amendment.
>
> 595 F.Supp. at 1424-1425.

The master recommended an order be entered prohibiting requiring any inmate to sleep on the floor without a mattress for any period of time. Id. at 1426. No objection was raised to this recommendation except for emergency circumstances. Id. at 1427. The district court ultimately ordered that inmates all be given a bed except that they might be required to sleep on the floor without a mattress in emergency circumstances and never without a mattress. Id. at 1440.

Here the undisputed testimony of the plaintiffs is that no facility was provided for sleeping purposes. No food or water was offered, and the

single request for a cup of water met with the response that there were no cups. The Third Circuit panel in this case unaminously found that it was error for the District Court to have dismissed the claim that failure to provide pretrial detainees with a place to sleep, food and water amounts to punishment in violation of the Fourteenth Amendment.

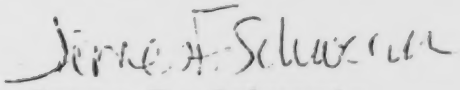
It is significant to note that any argument the City might advance is negated by the existence of Rule 3:4-1 regarding release of persons arrested for minor offenses. Had that rule been followed, these respondents and the other three girls arrested with them would not have been incarcerated at all. No attempt was made to alleviate the conditions on the night in question. It

is certainly not unreasonable to ask that persons incarcerated have access to water to drink, and if they are going to be held for more than a few hours at least some food of even the most basic kind be provided.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,



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